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No. 87-921

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN D. COPANOS & SONS, INC., ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the president of a corporation may volunteer to be the custodian of subpoenaed corporate documents and then assert his personal Fifth Amendment privilege against compulsory self-incrimination to shield the documents from production to the grand jury.

1. On June 12, 1986, a federal grand jury investigating possible violations of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, in connection with the manufacturing of injectable antibiotic drugs, issued a subpoena to petitioner John D. Copanos & Sons, Inc. (hereinafter the corporation).[1] The subpoena was addressed to "John D. Copanos & Sons, Inc." and did not

[1] The corporation and the government previously entered into a consent decree. The decree requires the corporation to comply with the FDA's good manufacturing practice regulations, to maintain a variety of records relating to the manufacture and distribution of drugs, and to make those records available to the FDA for inspection and copying (Pet. App. 12a, 27a).

name any individual in any capacity. The corporation moved to quash the subpoena on the ground that producing the records would violate the Fifth Amendment privilege against compulsory self-incrimination of petitioner John Copanos, the president of the corporation. The corporation argued that production of its corporation documents would incriminate petitioner Copanos, because he was allegedly the only person able to produce the documents.[2]

The district court denied the motion and ordered the corporation to produce the documents (Pet. App. 11a-25a; 658 F. Supp. 387). The court ruled that a corporation cannot invoke the Fifth Amendment privilege, and that petitioner Copanos could not invoke his own Fifth Amendment privilege against production of the documents, because the subpoena was directed to the corporation, not to him (Pet. App. 13a-22a). As the court found, "[t]he subpoena in this case was addressed neither to the president as an individual nor to the president in a representative capacity. The subpoena is directed solely to the corporation" (*id.* at 20a). The court also rejected petitioner Copanos' claim that he is the only person capable of complying with the subpoena, and it directed the corporation to produce the subpoenaed documents through " '*someone*'—any knowledgeable employee, or even a new agent" (*id.* at 23a (emphasis in original)).

The court of appeals affirmed the district court's judgment on the basis of the district court's opinion (Pet. App. 29a). The court of appeals later denied petitioners' motion for a stay of its judgment.[3]

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[2] According to an affidavit submitted by an FDA compliance officer familiar with the operation of the corporation, the corporation has more than 100 employees and an estimated annual gross income in excess of $50,000,000 (Pet. App. 12a).

[3] The corporation thereafter refused to comply with the district court's order and was held in contempt on November 20, 1987.

2. The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

a. This Court has repeatedly held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957). See also, *e.g.*, *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Bellis* v. *United States*, 417 U.S. 85, 88 (1974); *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911).[4] In so holding, the Court has reasoned that, because the custodian holds the records in a purely representative capacity on behalf of the corporation, production of the records is not a personal testimonial act of the custodian implicating his Fifth Amendment rights. *E.g.*, *Bellis*, 417 U.S. at 90. If the law were otherwise, the custodian could prevent the government from obtaining the records of his corporation despite the settled rule that corporations and other collective entities have no Fifth Amendment privilege. *Ibid.* The very purpose of the "collective entity" rule—namely, to facilitate government regulation of corporations and other artificial entities—could thus be easily defeated.

In 1984, in *United States* v. *Doe*, 465 U.S. 605, the Court held that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment. Unlike a corporation, a sole proprietor-

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[4] The Court has stated in the clearest possible terms that this rule applies to corporations such as the one involved here: "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis*, 417 U.S. at 100.

ship is not a collective entity, and nothing in the *Doe* opinion purports to reject the collective entity rule. It is true, as petitioner points out, that in the wake of *Doe* the courts of appeals have adopted differing approaches to the question whether the custodian of corporate records who is subpoenaed in his individual capacity may invoke the Fifth Amendment.[5] That difference of opinion does not aid petitioner, however, because *no* circuit allows a corporation to resist the production of its records altogether through the custodian's personal privilege. The five circuits (including the one below) that permit the custodian to invoke his personal privilege all hold that, if the government so requests, a corporation must produce subpoenaed records through some other person. *E.g.*, *In re Sealed Case*, 832 F.2d 1268, 1278, 1282 & n.9 (D.C. Cir. 1987);

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[5] Several circuits have reaffirmed the traditional rule that the custodian of corporate records may not invoke his Fifth Amendment privilege to refuse to comply with a subpoena for those records. See *In re Grand Jury Proceedings (Doe)*, 814 F.2d 190 (5th Cir. 1987), cert. granted *sub nom. Braswell* v. *United States*, No. 87-3 (Oct. 5, 1987); *In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir. 1986), cert. granted *sub nom. See* v. *United States*, No. 85-1987 (Oct. 6, 1986), cert. dismissed, No. 85-1987 (Jan. 15, 1987); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.) (en banc), cert. denied, 474 U.S. 1033 (1985); *United States* v. *Malis*, 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

On the other hand, five circuits – although they differ considerably with one another in approach – hold, contrary to the traditional rule, that there are at least some limited circumstances in which a custodian of corporate records may resist a subpoena on the basis of his personal Fifth Amendment privilege. See *In re Sealed Case*, 832 F.2d 1268, 1279 & n.7 (D.C. Cir. 1987); *In re Grand Jury No. 86-3 (Will-Roberts Corp.)*, 816 F.2d 569 (11th Cir. 1987), stay denied *sub nom. Roberts* v. *United States*, No. A-770 (Apr. 27, 1987); *United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *United States* v. *Antonio J. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc).

In re Special Federal Grand Jury Empanelled October 31, 1985, 819 F.2d 56, 57 n.1 (3d Cir. 1987); *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 573-574 (11th Cir. 1987), stay denied *sub nom. Roberts* v. *United States*, No. A-770 (Apr. 27, 1987); *United States* v. *Lang*, 792 F.2d 1235, 1240-1241 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985). That rule has been applied even in the case of a one-person corporation. *United States* v. *Antonio J. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *United States* v. *Rogers Transp., Inc.*, 793 F.2d 557, 558 (3d Cir. 1986); *In re Grand Jury No. 86-3 (Will Roberts Corp.), supra.* As the Second Circuit explained in *Two Grand Jury Subpoenae*, 769 F.2d at 57, "[t]here simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records." Thus, no court of appeals would uphold petitioners' claim that a corporation may refuse to comply with a subpoena simply because the production of subpoenaed documents might incriminate a corporate officer.

Petitioners claim (Pet. 6) that the question in this case is whether petitioner Copanos can be compelled to produce potentially incriminating corporate records. That claim ignores the fact (Pet. App. 20a) that the grand jury did not address its subpoena to petitioner Copanos and has not sought to compel him to do anything. The subpoena requires the corporation to produce its corporate documents, but the corporation may select anyone, even a new agent, to carry out that task. In essence, petitioner Copanos has sought to volunteer as a custodian and then invoke his personal Fifth Amendment privilege in order to defeat the corporation's obligation to comply with the subpoena. Even if the act of producing the subpoenaed documents would incriminate petitioner Copanos, the corporation can be required to find another custodian to pro-

duce them. Otherwise, a corporation could easily defeat the grand jury's right to examine corporate records. The courts below properly refused to allow petitioners to nullify the grand jury's inquiry in that fashion.[6]

b. Most of the records called for by the subpoena in this case are required to be maintained by FDA regulations.[7] Petitioner therefore argues (Pet. 9-11) that the Court should grant review to re-examine the "required records" exception to the Fifth Amendment privilege against compulsory self-incrimination. Under that exception, a party may not invoke the privilege to resist production of corporate or personal documents that are required to be kept by law. See *Shapiro* v. *United States*, 335 U.S. 1 (1948). Petitioner contends that the Court should determine whether that exception has survived this Court's decisions in *Fisher* and *Doe*. That claim lacks merit.

Neither the district court nor the court of appeals relied on the required records exception. The district court found (Pet. App. 21a n.6) that this case does not present any question whether that exception is applicable, since there was no evidence that any of the records maintained in accordance with the FDA's regulations were prepared or authored by petitioner Copanos. In fact, the court noted that the record indicated that the bulk of the documents were prepared by the corporation's quality control and

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[6] For that reason, there is no need to hold this case pending the disposition of *Braswell* v. *United States*, cert. granted, No. 87-3 (Oct. 5, 1987). The question in *Braswell* is whether the custodian of the records of a corporation may resist a subpoena that is addressed to him personally on the ground that the act of producing them would violate his personal privilege against compulsory self-incrimination. In this case, the subpoenaed records may ultimately prove incriminating to petitioner Copanos, but he has not been compelled to perform the act of production or to incriminate himself in any way.

[7] See 21 C.F.R. 211.180-211.208. The consent decree entered between the corporation and the government also requires the corporation to maintain the records (see Pet. App. 12a, 27a).

manufacturing personnel. *Ibid.* The court of appeals did not disturb the district court's finding (*id.* at 29a), and petitioners do not challenge it in this Court. This case therefore does not provide an opportunity for the Court to resolve the question presented by the petition.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

[8] The validity of the required records exception has been upheld by every court of appeals that has examined the question since this Court's decision in *Doe*. See *In re Grand Jury Proceedings (John Doe, M.D.)*, 801 F.2d 1164, 1168-1169 (9th Cir. 1986); *In re Two Grand Jury Supoenae Duces Tecum*, 793 F.2d 69, 73 (2d Cir. 1986); *In re Grand Jury Subpoena (Underhill)*, 781 F.2d 64, 69-70 (6th Cir. 1986), cert. denied, No. 85-1668 (Oct. 6, 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d at 528. See also *Underhill*, 781 F.2d at 69-70 (collecting court of appeals cases decided after *Fisher* but before *Doe* upholding the required records exception).

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